No. 77-855

In the Supreme Court of the United States

OCTOBER TERM, 1977

WARNER-LAMBERT COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 51a-86a) and its supplemental opinion on petition for rehearing (Pet. App. 87a-94a) are reported at 562 F. 2d 749. The decision and order of the Federal Trade Commission (Pet. App. 1a-47a) are reported at 86 F.T.C. 1398.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1977. Timely petitions for rehearing were denied on September 14, 1977 (Pet. App. 95a-97a).

The petition for a writ of certiorari was filed on December 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission is authorized by statute to require advertisers that have been found to have engaged in false or deceptive advertising to include corrective statements in future advertisements.

2. If so, whether the Commission properly exercised its authority on the particular facts of this case.

3. Whether the court of appeals abused its discretion in declining to remand the case to the Commission for its consideration of a Food and Drug Administration advisory panel report.

STATEMENT

Since its introduction in 1879, Listerine Antiseptic Mouthwash ("Listerine") has been represented as being beneficial for the treatment of colds and sore throats (J.A. 2819–2820).[1] Petitioner Warner-Lambert Company, which manufactures and sells Listerine, has spent approximately $10 million annually advertising Listerine; the advertisements frequently stressed that Listerine prevents or ameliorates colds and cold symptoms (J.A. 490–492, 2817). Listerine's major competitors have made no such claims (J.A. 900). In 1972 sales of Listerine accounted for ap-

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

proximately 50 percent of the nearly $200 million mouthwash market (J.A. 491, 2817).

The Federal Trade Commission issued an administrative complaint charging that Warner-Lambert's representations[2] that Listerine would cure, prevent or ameliorate colds, sore throats and their symptoms were false and misleading (J.A. 3–13). After extensive hearings the administrative law judge found that Warner-Lambert's representations were false (J.A. 503–562). He recommended that Warner-Lambert be ordered to cease and desist from making such representations in advertising and labeling and to include in all Listerine advertising (if any) for the next two years the corrective disclaimer that: "Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats" (J.A. 586–589).

The Commission substantially adopted the administrative law judge's factual findings and order. It found that Warner-Lambert's advertisements had created false beliefs, which are likely to continue to exist and influence decisions to purchase Listerine, and that despite any discontinuance of the misrepresentations a substantial proportion of the consuming public would retain such false beliefs "well into the 1980's"

[2] Not only Listerine's advertisements but also its labels represented that the product was efficacious for the treatment of colds and sore throats. A typical Listerine label and package carried the statement: "For * * * Colds and resultant Sore Throats" (Pet. App. 6a).

(Pet. App. 26a–31a).[3] The Commission concluded that "the continued sale of a product under false pretenses is itself a violation of the FTC Act, which, in the case of lingering false beliefs created by discontinued advertisements, can be remedied only by dispelling the false belief" (Pet. App. 26a; footnote omitted).

The Commission concluded that a "corrective advertising" disclosure order is "essential" to dispel the lingering effects of years of false advertising and related misrepresentations (Pet. App. 31a–34a). The Commission ordered Warner-Lambert to include, in approximately $10 million of Listerine advertising (if it chooses to advertise), the following statement (Pet. App. 46a):[4]

> Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity.

Warner-Lambert requested the Commission to reopen its proceedings to consider a draft report issued in February 1976 by an advisory panel of the Food and Drug Administration. The advisory panel, established to review over-the-counter cough and cold preparations, had dealt with some of the active ingredients of Listerine (J.A. 922–938). Warner-Lambert did not, however, contend that the advisory panel had considered evidence that was unavailable to the Commission. The Commission denied the petition to reopen, stating that the draft report had not been adopted by the Food and Drug Administration and that it had not found Listerine's ingredients to be effective for colds (Pet. App. 49a).[5]

[3] The continuing association in the public's perception of "Listerine" with the prevention and mitigation of "colds" was demonstrated in market surveys. The court of appeals summarized the evidence as follows (Pet. App. 74a–75a n. 65):

"The Commission used the results of a series of market surveys known as 'Product Q' reports on the 'Mouthwash Market.' The surveys were conducted by petitioner for its own purposes from 1963 to 1971. According to petitioner's own advertising agency, 'Product Q is ideally suited to provide guidance in such vital areas as * * * [h]ow successful are the current advertising campaigns of different brands on awareness, recall, attitudes and sales?' JA 2785–2786. The surveys showed that about 70% of the consumers questioned recalled 'effective for colds and sore throats' as a main theme of Listerine advertising. During the summer, when no cold claims had been broadcast for about six months, the percentage fell to only 64%; *i.e.*, the recall of cold claims after six months of silence was very substantial. The surveys also showed that about 60% of consumers questioned believed Listerine was 'one of the best' mouthwashes for the quality 'effective against colds and sore throats.'" JA 568–580.

"The Commission also relied on the testimony of two experts in the field of consumer marketing surveys. Dr. Bass testified that cold efficacy belief levels would continue at about 60% for two years after colds advertising ceased and would remain high after five years. JA 1591–1592, 1617. Dr. Rossi testified that cold efficacy beliefs would decline at no greater a rate than 5% per year." JA 1522, 1556–1559.

[4] The Commission's statement does not refer to Warner-Lambert's "cure" claims, because "the record does not demonstrate that consumers hold cure beliefs" (Pet. App. 32a n. 29).

[5] While the case was pending before the court of appeals, the advisory panel issued its final recommendations to the Commissioner of the Food and Drug Administration. See 41 Fed. Reg. 38312 (1976). Warner-Lambert requested the court to remand the case to allow it to present additional evidence to the Commission concerning the panel's recommendation. The court of appeals denied the application (Pet. App. 50a). The panel later dealt with the question fully (*id.* at 57a–60a).

A divided panel of the court of appeals affirmed the Commission's order. The court first held that the Commission's finding that Listerine is ineffective for the treatment of colds and sore throats is supported by substantial evidence (Pet. App. 54a–60a). It pointed out that Listerine's active ingredients kill only germs (bacteria), whereas colds are caused by viruses, and that Listerine's active ingredients do not reach the loci of cold infections in therapeutic quantities. The court also concluded that there was no need for the Commission to reopen its proceedings to consider the report of the Food and Drug Administration advisory committee. Nothing in the draft report undermined any of the Commission's findings, the court observed, and the report had not, in any event, been approved by the Food and Drug Administration.

The court also held that the Commission has the statutory authority to order corrective advertising because its "cease and desist" power comprises, among other things, the power to prevent advertisers from capitalizing on a reputation that was based on false or misleading advertisements in the past (Pet. App. 60a–64a, 66a–71a). The court then sustained the corrective disclosure as an appropriate exercise of the Commission's authority (*id.* at 72a–77a).[6]

[6] The court modified the order by striking the preamble "[c]ontrary to prior advertising" (Pet. App. 74a–76a). The Commission disagrees with this modification, and it has filed a conditional cross-petition for a writ of certiorari, seeking review of the modification in the event that the Court should grant Warner-Lambert's petition.

Judge Robb dissented (Pet. App. 78a–86a). He would have held that the Commission does not have the authority to require corrective disclosures in future advertisements. He agreed with the majority, however, that the advertisements for Listerine were false and deceptive and that the Commission was not required to reopen its proceedings.

Warner-Lambert's petition for rehearing argued, among other things, that the required disclosure of Listerine's ineffectiveness violated the First Amendment. The court of appeals issued a supplemental opinion (Pet. App. 87a–93a), pointing out that governmental bodies may regulate advertising to ensure that it is not false and deceptive. It explained (*id.* at 89a–90a): "The Commission is not regulating truthful speech protected by the First Amendment, but is merely requiring certain statements which, if not present in current and future advertisements, would render those advertisements themselves part of a continuing deception of the public."

The court recognized that on some occasions a requirement of corrective statements might "chill" speech, but it thought that the predominant effect would be to chill false or misleading speech. It concluded (*id.* at 90a): "whatever incremental chill is caused by a corrective advertising order beyond that which would result from a cease and desist order may well be necessary if the interest of consumers in truthful information is to be served at all. Otherwise, advertisers remain free to misrepresent their products to the public, knowing full well that even if the

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[Commission] chooses to prosecute they will be required only to cease an advertising compaign which by that point will, in all likelihood, have served its purpose by deceiving the public and already been replaced." Finally, the court concluded that the corrective disclaimer is the "least restrictive means" (*id.* at 92a) of protecting the public from the continuing effects of Warner-Lambert's past deception.

ARGUMENT

This case is, as Warner-Lambert concedes (Pet. 5, 14, 15), one of first impression. There is no conflict among the courts of appeals concerning either the statutory authority for or the constitutionality of requirements of "corrective advertising." The facts of this case provide compelling justification for the corrective advertising the Commission ordered, and the court of appeals correctly upheld the agency's authority to provide that relief.

1. The Commission found, and the court of appeals agreed, that Warner-Lambert's representations in advertisements and labels that Listerine is effective for the treatment of colds and resultant sore throats were false and misleading. Warner-Lambert does not challenge those conclusions here. The Commission also found, and again the court of appeals agreed, that the continuing sale of Listerine amounts to capitalization on the erroneous beliefs engendered by the prior false and misleading advertising (Pet. App. 26a, 87a–92a). Petitioner does not challenge those conclusions either. Consequently, as the case comes to this Court, the

only question is whether the Commission may take the steps that it found, and the court of appeals agreed, were the "least restrictive means" (Pet. App. 92a) essential to prevent Warner-Lambert from capitalizing in the future on beliefs it produced by prior deception.

Warner-Lambert contends that the Commisison may not, because, Warner-Lambert argues (Pet. 23–24), the Commission's authority to issue "cease and desist" orders does not include the authority to require advertisers to undo the consequences of their misdeeds. But this Court has held many times that the Commission's "cease and desist" powers afford it ample authority to impose requirements that it reasonably believes are appropriate to overcome the past misconduct.[7] The Commission's "cease and desist" powers similarly authorize it to require corrective statements in future advertising that Warner-Lambert uses, where capitalization on the lingering beliefs about Listerine would constitute renewed deception. The relief ordered by the Commission "has [a] reasonable relation to the unlawful practices found to exist" (*Jacob Siegel Co.* v. *Federal Trade Commission*, 327

[7] See, *e.g.*, *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 311–313 and nn. 17 & 18; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (ban on misleading advertising of "any product," not only the products involved in the case); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429–430 (ban on zone delivered pricing system); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 457, 470, 473 ("If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled").

U.S. 608, 612–613) and thus was within the Commission's authority.[8] Section 5(b) of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. (1970 ed.) 45(b), gives the Commission the authority to stop any person from "using" an unfair practice, and it was proper for the Commission to conclude that future advertisements and sales of Listerine without a disclaimer amount to a continued "use" of past deception.

Petitioner's reliance on the legislative history of the Commission's statutes is unwarranted. The fact that Congress chose not to give the Commission the power to impose civil or criminal penalties is simply irrelevant to the question whether the Commission may require an advertiser to undo in future advertising what it has improperly done in past advertising and to refrain from capitalizing on its misrepresentations.

The 1975 legislation to which Warner-Lambert refers expressly states that Congress did not affect in any way the Commission's power under existing statutes.[9] The Commission has exercised for many

[8] Warner-Lambert contends, in effect, that it may use deceptive advertising and continue to reap the benefits of the deception during the pendency of enforcement proceedings and even after an order is issued, knowing that the order would at most require it to "go, and sin no more." The ineffectiveness of such a remedy might encourage manufacturers to take a "free bite at the apple." See Note, "*Corrective Advertising Orders*" *of the Federal Trade Commission*, 85 Harv. L. Rev. 477, 482–483 (1971).

[9] See 15 U.S.C. (Supp. V) 57b(e). The conference report on the legislation, which the court of appeals quoted at Pet. App. 64a but which Warner-Lambert ignores, also stated that the legislation had nothing to do with the Commission's existing power. See H.R. Conf. Rep. No. 93–1606, 93d Cong., 2d Sess. 42 (1975).

decades the power to require the correction of false impressions produced by advertising. As the court of appeals observed, the term "corrective advertising" may be new, "but the concept is well established" (Pet. App. 66a).[10] The Commission's longstanding interpretation of the statute it administers, an inter-

[10] For example, courts have upheld orders requiring corrective language to be used in connection with trade names (in advertising or otherwise) where consumer beliefs associated with products sold under the trade name and instilled through years of advertising have become misleading because of changes in the product. See *Royal Baking Powder Co.* v. *Federal Trade Commission*, 281 Fed. 744, 753 (C.A. 2); *Waltham Watch Co.* v. *Federal Trade Commission*, 318 F. 2d 28 (C.A. 7), certiorari denied, 375 U.S. 944. See also *Waltham Precision Instrument Co.*, 61 F.T.C. 1027, 1049, affirmed, 327 F. 2d 427 (C.A. 7), certiorari denied, 377 U.S. 992. Similarly, numerous decisions have upheld orders requiring affirmative disclosures intended to impart material information to the prospective purchaser (rather than to remove deception from an ongoing advertising theme), on the ground that it is an unfair or deceptive practice for the seller to fail to correct erroneous material assumptions about a seller's product, even though the seller never affirmatively misrepresented its products. See *Kerran* v. *Federal Trade Commission*, 265 F. 2d 246 (C.A. 10), certiorari denied *sub nom. Double Eagle Refining Co.* v. *Federal Trade Commission*, 361 U.S. 818 (requiring disclosure that oil has been reprocessed); *Baldwin Bracelet Corp.* v. *Federal Trade Commission*, 325 F. 2d 1012 (C.A. D.C.), certiorari denied, 377 U.S. 923 (requiring disclosure of country of origin of a manufactured product); *All-State Industries* v. *Federal Trade Commission*, 423 F. 2d 423 (C.A. 4), certiorari denied, 400 U.S. 828 (requiring disclosure that buyer has certain rights). This line of authority was cited with approval in *Federal Trade Commission* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 388–389, where this Court referred to the practice as misrepresentation by concealment. If affirmative disclosure can be required to correct erroneously held beliefs that did not arise from any affirmative misrepresentation of the seller, then it must follow that the Commission may require corrective disclosure where erroneous beliefs were caused by the advertiser.

pretation left standing by Congress, is entitled to substantial deference here.

It makes no difference—either to the question of statutory authorization or to the question whether the Commission has transgressed First Amendment limitations—that Warner-Lambert may believe that the truth of its previous representations is open to good-faith dispute. The Commission is authorized by statute to ensure that the representations in advertisements are truthful, and the First Amendment also permits the Commission to scrutinize advertisements for truth. See *Bates* v. *State Bar of Arizona,* No. 76–316, decided June 27, 1977, slip op. 29–31; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771–772. Someone must decide where the truth lies, and the fact that Warner-Lambert may believe that a statement is truthful does not make it so.[11] Contentions about matters of scientific fact are susceptible of proof or disproof; once the Commission, supported by substantial evidence, has found particular contentions to be inaccurate, it should not matter whether persons reasonably could have believed the contrary. The *most* deceptive statements may be those that reasonable persons could think to be true, but which are false in fact.

[11] There has been no finding in this case, however, that Warner-Lambert believed in good faith that its representations concerning Listerine were truthful. The court of appeals observed that the record "could support" such a finding (Pet. App. 76a), but neither the court nor the Commission so found. The court held that good faith "is irrelevant to the need for corrective advertising in general" (*id.* at 76a n. 20). We assume for present purposes, however, that Warner-Lambert was acting in good faith.

The Commission found Warner-Lambert's representations to be false in fact. Many courts have held that advertisers must accept such resolutions of disputed questions. See, *e.g., J.B. Williams Co.* v. *Federal Trade Commission,* 381 F. 2d 884, 887–889 (C.A. 6); *Keele Hair & Scalp Specialists, Inc.* v. *Federal Trade Commission,* 275 F. 2d 18 (C.A. 5); *Feil* v. *Federal Trade Commission,* 285 F. 2d 879 (C.A. 9). The advertiser's good faith belief that the Commission is wrong does not insulate it from remedial action; otherwise the advertiser, rather than the Commission, would have the last word on which product claims are permissible and which are not. See *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U.S. 67, 81. Cf. *Reilly* v. *Pinkus,* 338 U.S. 269, 276–277. "It is indeed a rare case where medical experts are called which does not involve disagreement" (*Ward Laboratories, Inc.* v. *Federal Trade Commission,* 276 F. 2d 952, 954 (C.A. 2), certiorari denied, 364 U.S. 827), and there is no sound reason to confine the Commission's power effectively to deal with untruthful or misleading advertisements to the "rare case" in which everyone (including the advertiser) agrees that the advertiser's claims are baseless.[12]

[12] That the Commission might choose not to resolve a disputed scientific or medical issue in one case does not mean that its authority to resolve such disputes in other cases is limited. Accordingly, Warner-Lambert errs in arguing (Pet. 20–21) that the decision here conflicts with the Commission's own decision in *National Commission on Egg Nutrition,* 88 F.T.C. 89, affirmed as modified *sub nom. National Commission on Egg Nutrition* v.

2. Warner-Lambert contends (Pet. 16–21) that the Commission's order violates the First Amendment

Federal Trade Commission, C.A. 7, No. 76–1969, decided November 29, 1977, supplemental opinion issued, January 23, 1978. The Commission did not attempt there to resolve the unsettled scientific question whether the intake of cholesterol is related to the incidence of heart disease. The Commission had no need to do so; it found it to be a deceptive practice to advertise that there was absolutely *no* scientific evidence to show that eating eggs increases the risk of heart disease, where recognized experts, based on reliable and competent evidence, thought that there is such a connection. Because its decision was not an endorsement of either side of the scientific controversy, the Commission's order did not prevent the association from presenting to consumers its point of view regarding the safety of eating eggs, provided that it also made the statement that many medical experts believe increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease (88 F.T.C. at 203–205).

Although there were once conflicting beliefs about the cause of the common cold, the record established that during the last 30 years research has proved that antibacterial agents of the sort contained in Listerine cannot prevent or mitigate colds. It is undisputed that the common cold is caused by viruses, which, after being inhaled into the nose, infect cells in the nasal pharynx. Bacteria in the mouth play no role in the causation of colds; hence, although an antiseptic such as Listerine perhaps "Kills Germs By Millions on Contact" (as Listerine labels have stated and may continue to state under the Commission's order), this would have no effect on the common cold. Nor would the ingredients of Listerine have any significant therapeutic effect on symptoms of colds, according to the evidence (J.A. 506–510). As for sore throats, Listerine can provide only transient relief attributable to the mechanical action of gargling rather than to the effects of Listerine's ingredients (J.A. 506).

Petitioner's assertion that there is "genuine scientific controversy" rests largely on the report of the Food and Drug Administration advisory group. This report, Warner-Lambert says, found Listerine "likely to be effective for colds" (Pet. 11–12, 22).

because it requires an advertiser to make particular statements that it does not desire to make.

This Court's recent cases have held that commercial speech is protected by the First Amendment. But the protection is not unqualified. Government may regulate commercial advertisements to ensure their truthfulness and to prevent deception. *Bates* v. *State Bar of Arizona, supra; Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra; Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 69 n. 31 (plurality opinion). Commercial speech is engaged in for profit and is not easily chilled; moreover, as here, questions about truth and falsity can be resolved objectively. These special attributes of commercial advertisements "make it appropriate to require that a commercial message appear in such a form, *or include such additional information, warnings and disclaimers,* as are necessary to prevent its being deceptive." *Virginia State Board, supra,* 425 U.S. at 772 n. 24 (emphasis added).

The Commission's order at issue here is, as the court of appeals held (Pet. App. 92a), the "least restrictive means of achieving [the] substantial and important governmental objective" of preventing deception of consumers. Warner-Lambert's prior ad-

The court of appeals, however, held that Warner-Lambert's characterization "is not supported by the facts" (Pet. App. 59a n. 23). The agency advisory panel concluded only that the data it reviewed—which did not include all the evidence before the Commission (see note 16, *infra*)—were sufficient to demonstrate whether the ingredients were effective and that further testing was required.

vertisements have created a widespread belief on the part of the public that Listerine is effective as a treatment of colds and sore throats. Unless Warner-Lambert includes in future advertisements the language specified by the Commission, Warner-Lambert will continue to obtain benefits from its deception.

It makes little conceptual difference whether this continued benefit is seen as the fruit of deception or whether, instead, future advertisements without the corrective disclaimers are seen as themselves deceptive.[13] The point, in either case, is that the First Amendment does not give advertisers a license to reap the rewards of deceit. The Commission has prohibited Warner-Lambert from making future representations that Listerine is efficacious for colds. It is too late to undo the sales of Listerine from prior years, and the Commission did not require Warner-Lambert to make reparations to those it deceived. But the truth need not lie dormant, and the Commission properly required Warner-Lambert effectively to retract the falsehood of its prior advertisements and to desist from trading on the incorrect beliefs it created.

[13] Warner-Lambert repeatedly asserts (Pet. 6, 14, 17) that the Commission did not find that future advertising would itself be deceptive unless it carried a disclaimer. This assertion is misleading. The Commission found (Pet. App. 26a) that future sales of Listerine would be unfair and based on deception unless the false beliefs were dispelled and, in light of this finding, it simply had no occasion to pass on the administrative law judge's additional finding that future Listerine "germ killer" advertisements without a disclaimer would be misleading because they would remind the public of past "cold" claims (see *id.* at 32a n. 28).

Warner-Lambert's further contention (Pet. 18) that the First Amendment prohibits the Commission from compelling it to say something with which it does not agree overlooks this Court's statement in *Virginia State Board* that the government may require advertisers to disclose material facts even when they would rather not do so.[14] If petitioner were correct in this regard, the Commission could cope with deceptive advertising only when the advertiser consented to the remedy; this Court has never held that the Commission's authority is so limited. Moreover, in proceedings before the Commission, Warner-Lambert opposed a suggestion that the required disclosure state that "the Federal Trade Commission has found" that Listerine is ineffective in the treatment of colds (J.A. 480–481). The Commission thus has not required Warner-Lambert to state the Commission's findings as if it were

[14] Petitioner contends that the passage in note 24 of the Court's opinion pertains only to disclosures necessary to make the advertisement truthful within its four corners and not to disclosures that correct misrepresentations in other advertisements. But there is no reason to treat the government's authority to ensure that the stream of commercial information flows "cleanly as well as freely" (425 U.S. at 772) so narrowly. The effects of advertising campaigns may persist for years; the evidence of record shows that Listerine's advertisements have had lasting effects (see Pet. App. 26a–31a). The ability to prevent deception should not be circumscribed by the 60-second length of a television commercial. If the Commission can require correct disclosure to follow 30 seconds after a misleading statement, it also should be able to require disclosure several years later. To hold otherwise is to allow advertisers to retain the benefits of deceit, since particular advertisements or advertising campaigns almost always would have run their course before the Commission could find that the absence of a full disclosure had made them deceptive.

Warner-Lambert's own belief; to the extent the language in the Commission's order has that appearance, it does so at Warner-Lambert's option. Nothing would prevent Warner-Lambert from stating in advertisements that the Commission, and not Warner-Lambert, has determined that Listerine is useless as a cold remedy.

3. Petitioner contends (Pet. 22) that the court of appeals was required to remand the case to the Commission and to instruct the Commission to accept evidence concerning the ongoing Food and Drug Administration proceedings. The court of appeals properly held, however, that the advisory panel's report has no significant bearing on this case (Pet. App. 56a–60a). It has not been adopted by the Commissioner of the Food and Drug Administration; it is not based on any evidence that Warner-Lambert has not already presented to the Commission; and it "does not, to any significant degree, contradict the Commission's findings"(*id.* at 57a).

The advisory panel did not find, as Warner-Lambert implies (Pet. 9), that Listerine as a mouthwash would "likely" be effective against colds or their symptoms. Rather, it concluded concerning each of Listerine's ingredients that (Pet. App. 58a–59a):

> there are no well-controlled studies documenting the effectiveness of [this ingredient] as an [antitussive, expectorant, or nasal decongestant].

The panel recommended that each of Listerine's active ingredients should be placed in Category III, and that Warner-Lambert and other producers should be required to produce "[d]ata to demonstrate effectiveness * * *" (Pet. App. 59a).[15] As the court of appeals stated, "[s]ince the FDA did not consider the extensive record compiled in the FTC proceedings, its conclusion that there is insufficient data about the ingredients of Listerine to justify classifying it as effective or ineffective is not necessarily inconsistent with the

[15] Under the Food and Drug Administration (FDA) regulations, the placement of a product in Category III denotes that the panel lacks evidence either to approve or to disapprove the claims for the product. See 21 C.F.R. 330.10(a)(5)(iii).

After the FDA panel report was placed on the public record, the Commission's Bureau of Consumer Protection filed comments with FDA, submitting relevant excerpts from the adjudicative record in this case and recommending, in view of the affirmative evidence adduced in the Commission's proceeding concerning the lack of efficacy of Listerine for treatment of colds, that the FDA place the active ingredients in Listerine, when used by a gargling mechanism, in Category II. Placement in Category II would mean that a mouthwash similar to Listerine could not, under FDA regulations, carry a label indicating that the product may be used as treatment for cold symptoms (21 C.F.R. 331.10(a)(6)(ii)). The Commissioner of FDA has not yet acted on this recommendation.

Warner-Lambert incorrectly asserts (Pet. 8–9 n. 9) that under the Commission's "Proposed Rule Concerning Advertising for Over-the-Counter Drugs" (40 Fed. Reg. 52631), the Commission would proceed against advertising for over-the-counter drugs only where the FDA has found the drug misbranded and has placed it in Category II. This is incorrect. The rule applies to drugs in Category II, but nothing in the proposed rule would limit Commission action to such situations and, indeed, the rule is silent on the proper treatment of drugs that the FDA finally places in Category III.

FTC's conclusion that Listerine's advertising claims are deceptive" (Pet. App. 59a–60a).[16]

The court of appeals' refusal to remand the case to the Commission for additional evidence is consistent with this Court's prior decisions. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 294–296; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514–515. Administrative proceedings must have an end, and the submission of the advisory panel's report is not a sufficient reason to require the Commission to go through another round of hearings.[17]

[16] The evidence that was before the FDA panel fell far short of the extensive evidence that was before the Commission. The record before the FDA advisory panel (which had the task of analyzing some 180 ingredients used in as many as 50,000 products (J.A. 3121–3229)), insofar as it deals with these ingredients in a mouthwash, was limited to the St. Barnabas study, a clinical study of Listerine conducted by Warner-Lambert but assessed as worthless by experts who had examined the methodology Warner-Lambert used in the study (J.A. 2207–2394). See generally Pet. App. 38a–41a, 55a–56a, 58a n. 19.

The panel's tentative report, published in February 1976, did not refer to mouthwashes or the St. Barnabas study (J.A. 3090–3803). As the court of appeals noted, it appears that the references to the St. Barnabas study and to mouthwashes were included in the report only as an afterthought, and then only at Warner-Lambert's urging (Pet. App. 58a). The minutes of the panel's final meeting state that "a letter was received concerning the fact that no references were made in the report on a submission concerning the use of volatile aromatics in mouthwashes for the symptomatic relief of the common cold." The panel voted to add to sections of the report dealing with menthol, eucalyptol and thymol a paragraph containing a reference to mouthwashes and the St. Barnabas study (J.A. 3045–3046).

[17] If the FDA eventually takes final action that Warner-Lambert deems relevant to the continued validity or applicability of the Commission's decision and order, it may petition the Commission for relief pursuant to 15 U.S.C. 45(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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